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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1960

NO. 428

PITTSBURGH CONSOLIDATION COAL COMPANY, Petitioner,

v.

JOHN A. WOUNICK, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The judgment and decree sought to be reviewed are interlocutory and

(a) do not involve any novel or important question of law basic to the petitioner's position;

Mere reference to the judgment of the Third Circuit Court in Appendix C of the Petition for Writ of Certiorari, pages 23 and 24, demonstrates that the cause of action predicated upon the doctrine of unseaworthiness was not even ready for trial let alone tried and disposed of substantively by the District Court; and remand by the judgment of the Circuit Court is clearly in the nature

of a procedendo, and is, therefore, interlocutory. As this Court has repeatedly held, a non-final judgment is not subject to review by certiorari herein except in special instances; *American Construction Company v. Jacksonville T. & K. R. Co.*, 148 U. S. 372, 384, 13 S.Ct. 758, 37 L.ed. 486, wherein it was clearly asserted that "this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; *Youngstown Sheet & Tube Company v. Sawyer*, 343 U. S. 579, 584-5, 72 S.Ct. 863, 96 L.ed. 1153.

The pronouncement of policy in regard to interlocutory appeals is in accord with the ruling law as set out in *4 Corpus Juris Secundum, Par. 92, page 238* as follows:

> "It is the general rule, therefore, that an appeal, writ of error, exceptions, or other proceeding for review will not lie from or to an interlocutory or intermediate decision unless it is expressly permitted by statute, rule or constitutional provision,—"

The rule particularly applies where the judgment of the Circuit Court is one remanding the case to the District Court for a new trial; *American Construction Company v. Jacksonville, etc., supra.* Most recently this Honorable Court has reaffirmed its policy of avoiding piecemeal appeals in its decision in *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U. S. 77, 81, 78 S. Ct. 1063, 1066, 2 L.ed. 2d 1174, wherein it reaffirmed *Slaker v. O'Connor*, 278 U. S. 188, 189, 49 S. Ct. 158, 73 L.ed, 258, subject to the modification of *South Carolina Electric and Gas Company v. Flemming*, 351

U.S. 901, 76 S. Ct. 692, 100 L.ed 1439, requiring finality of judgment as a basis for appeal except where, in effect, "the Court of Appeals resolved all disputed questions between the parties." Certainly the judgment of the Third Circuit does not resolve any of the factual disputes involved between the parties; and, in the words of the Circuit Court, referring to the record below, "no defense of the statute of limitations or laches was raised in the answer,—" (Appendix C, Petition for Writ, page 9); and "The case must, therefore, be returned to the district court for a full consideration of all the relevant facts pertaining to laches, e.g., that the defendant had knowledge of the accident from the day of the occurrence; that it had a list of possible witnesses from the same date; and that the complaint (libel) was filed only thirteen days following the running of the analogous three-year statute of limitations. On remand, the plaintiff should also be granted an opportuntity to amend his libel and plead any additional facts negativing prejudice and excusing his delay."

(b) there is no conflict on a question of law with another Court of Appeals or a highest State Court justifying review at this stage;

In view of the lack of pleadings, proof or trial disposition of the issues yet to be placed before the District Court, it is inconceivable how petitioner hopes to impose the controversy upon this Honorable Court at this stage. The petition certainly does not bring before this Honorable Court any substantive conflict in law, or anomalous or other pressing and undefined area of law requiring extraordinary review such as would affect the course of the trial below. There is no state statute or

right to be molded by decisional law of this high tribunal with the maritime law as justified an appeal in *The Vessel M/V Tungus, etc. v. Olga Skovgaard etc.*, 358 U. S. 588, 79 S. Ct. 503, 3 L.ed 2d 524, or in the cases above cited and in *United States v. General Motors Corp.*, 323 U. S. 373, 65 S. Ct. 357, 89 L.ed. 311.

The simple and obvious fact is that the Third Circuit recognized that the learned District Judge, being under the impression that the three-year statute of limitations of the Jones Act barred also the cause of action based upon unseaworthiness, dismissed the latter action without trial thereof.

(c) there is no jurisdictional question barring trial in the District Court;

Certainly, it is not disputed that when the case is returned to the District Court, it must assume an admiralty status by reason of the lack of diversity, amendments to the pleadings on the part of both parties will be required and, thereafter, for the first time, the cause will be put to trial. At no time in the pleadings or in the petition for writ of certiorari does the petitioner deny that the District Court has jurisdiction to carry out the mandate of the Third Circuit or to apply, upon the trial, the rules and law of admiralty appertaining.

(d) the cause remanded for trial has not yet been tried by the District Court;

The frank and clear statement of the learned Trial Judge as appears in Appendix B of the Petition for Writ at pages 17 and 18 indicates that dismissal of the unseaworthiness count and cause was predicated upon a mere mistake of law as well as a belief that it was not

necessary for the Trial Court to enter into the elements of proof required by the defense of laches, but that the three-year statute of the Jones Act was an absolute bar to any cause of action based upon unseaworthiness.

As the Third Circuit clearly points out, the Jones Act cause did not exist at the time of the filing of the combined action inasmuch as the three-year statute of limitation, being substantive, had already run; the only right of action remaining in the plaintiff seaman at that time, therefore, was obviously the one that remains untried. Under these circumstances, the Third Circuit points out that the doctrine of elections is not applicable since there was no election posed for the seaman plaintiff, his sole and only remedy lying in admiralty and the general maritime law.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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